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NO. 94-1577

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

FBT BANCSHARES, INC.
PETITIONER

versus

MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY, INC.,
(IN REHABILITATION)
RESPONDENT

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FROM THE ORDER DATED DECEMBER 13, 1994

REPLY TO OPPOSITION

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SUMMARY OF REPLY

(1) THIS COURT'S DECISIONS IN *MORRIS V. JONES*, 329 U.S. 545, 67 S.CT. 451, 91 L.ED.488 (1947) AND *AMERICAN IRON & STEEL MANUFACTURING V. SEABOARD AIR LINE RAILWAY*, 233 U.S. 261, 34 S.CT. 502, 58 L.ED 949 (1914) ARE CONTROLLING AND WARRANT THE GRANTING OF CERTIORARI.

(2) THE REHABILITATOR CANNOT OVERRIDE THE UNITED STATES CONSTITUTION; MOREOVER, MUTUAL'S OPPOSITION ACTUALLY ***CONFIRMS THE APPLICABILITY OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.***

(3) THE 1992 RULING OF THE PENNSYLVANIA SUPREME COURT REGARDING PEPSICO IS ***NOT RES JUDICATA*** AS TO FBT.

(4) IT WAS MUTUAL WHICH WAIVED THE PLAN BY ***NEVER INCLUDING FBT*** IN THE PLAN; MOREOVER, MUTUAL IS ESTOPPED FROM INVOKING A PLAN WHICH IT ***NEVER PLEADED AS A DEFENSE IN THE LOUISIANA LITIGATION.***

(5) THE OPPOSITION DOES NOT CONTEST THE ANNOUNCEMENT THAT MUTUAL WILL SOON "***...EMERGE AS A FUNTIONING INSURANCE COMPANY...***" AND THE SOLVENCY EXCEPTION APPLIES HERE.

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ARGUMENT AND LAW

(1) THIS COURT'S DECISIONS IN *MORRIS V. JONES*, 329 U.S. 545, 67 S.CT. 451, 91 L.ED.488 (1947) AND *AMERICAN IRON & STEEL MANUFACTURING V. SEABOARD AIR LINE RAILWAY*, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed 949 (1914) ARE CONTROLLING AND WARRANT THE GRANTING OF CERTIORARI.

This is a case in which a state court has decided constitutional questions "...in a way that conflicts with applicable decisions of [the Supreme] Court. Supreme Court Rule 10.1(c). ***The Insurance Commissioner for the State of Pennsylvania cannot override the jurisprudence of this Honorable Court.***

The legal issues in this case have long been settled in the cases of *Morris v. Jones,* 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed.488 (1947), and *American Iron & Steel Manufacturing v. Seaboard Air Line Railway,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914). In the instant case, FBT obtained a final judgment in Louisiana for principal and interest against Mutual, and sought to have the judgment recognized in Pennsylvania, where Mutual was in rehabilitation. In *Morris, supra,* the facts were the same except: (a) that insurance company was in liquidation as opposed to rehabilitation and (b) that insurance company did not contest the suit in Missouri, whereas Mutual chose to vigorously contest the suit in Louisiana. In her opposition, the Pennsylvania Insurance Commisssioner does **not** suggest that *Morris, supra,* is inapplicable, but rather misstates the holding of this Court.

Here, the Pennsylvania Supreme Court, ***without giving reasons,*** simply refused to give FBT's Louisiana Judg-

ment ***full*** faith and credit. In her opposition to FBT's petition for writ of certiorari, Mutual's rehabilitator argues that FBT is attempting to create a separate set of priorities. ***That is absolutely not correct.*** FBT is simply requesting compliance with the United States Constitution. In *Morris, supra*, this Court dealt with Mutual's specious argument, at 455:

> "The establishment of the existence ***and amount*** of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have."

Accordingly, the total amount of FBT's Judgment should have been recognized. The Rehabilitator willingly submitted to the jurisdiction of the Louisiana Courts. It is axiomatic that the rehabilitator ***is conclusively bound by all aspects of the Louisiana Judgment.*** In *Morris, supra*, this Court so held at 455:

> " 'A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default.' (citations omitted) Such a judgment obtained in a sister state is...entitled to full faith and credit in another State, ***though the underlying claim would not be enforced in the State of the forum.***"

The Commonwealth Court of Pennsylvania refused to enforce FBT's underlying claim for judicial interest, citing Pennsylvania law (i.e., the Pennsylvania Supreme Court's handling of Pepsico's claim). But because Mutual did not raise that issue in any of the Louisiana courts, Mutual did **NOT** have the right to relitigate what "...had

ripened into a (final) judgment..." This, too, was the holding of this Court in *Morris, supra*, at 456:

> "[The Missouri] judgment was a final determination of the nature and amount of [the plaintiff's] claim...That determination [the Missouri judgment] is final and conclusive in all courts. ***'Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment.'*** "

Although in *Morris* this Court did not have the issue of priorities in distribution before it (at 457), this Court's decision in *American Iron and Steel, supra*, is dispositive on that issue. In her opposition, the Pennsylvania Insurance Commissioner misstates this Court's holding by suggesting that the obligation to pay interest ceases when receivership proceedings commence. (Opposition, at p.19.) That was **NOT** the holding of this Court, which recognized, at 504, that:

> "...***in case funds are not sufficient to pay claims of equal dignity,*** the distribution is made only on the basis of the principal of the debt. ***But that rule did not prevent the running of interest during the receivership;*** and if, as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid."

Notwithstanding the arguments made by the Pennsylvania Insurance Commissioner in her opposition, the *sub silentio* judgment of the Pennsylvania Supreme Court violates the jurisprudence of this Court and this case qualifies for certiorari pursuant to the guidelines set forth in Rule 10.1(c) of the Rules of the Supreme Court of the United States, which has always been the ultimate guard-

ian of the Full Faith and Credit Clause of the United States Constitution.

> (2) THE REHABILITATOR CANNOT OVERRIDE THE UNITED STATES CONSTITUTION; MOREOVER, MUTUAL'S OPPOSITION ACTUALLY ***CONFIRMS THE APPLICABILITY OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.***

In her opposition, the Pennsylvania Insurance Commissioner argues that she had "discretion" to essentially split the Louisiana Judgment into two separate parts. Not only did Mutual fail to make such an argument in the Louisiana courts, but the very section of the plan upon which the rehabilitator relies ***confirms*** the applicability of the Full Faith and Credit Clause.

The allegedly applicable provision of the Plan of Rehabilitation is quoted at page 4 of the opposition brief, but with the *wrong* emphasis supplied. The following emphasis is correct and provides for the full recognition of FBT's Louisiana Judgment:

> "Except as may be otherwise provided for in this Plan, ***or as may be otherwise required under applicable law,*** all Creditors holding Unsecured Claims shall waive interest, late charges, penalties, attorney's fees and court costs against Mutual Fire and the Rehabilitator..."

The "...applicable law..." happens to be the United States Constitution. Pursuant to the Full Faith and Credit Clause, Pennsylvania is bound conclusively and completely

by the final judgment of its sister state, Louisiana. The rehabilitator cannot override the rights, privileges and immunities guaranteed to FBT by the United States Constitution. The proper time for Mutual to have pleaded *any* aspect of the plan was in the Louisiana Courts...

PRIOR TO JUDGMENT!!!

(3) THE 1992 RULING OF THE PENNSYLVANIA SUPREME COURT REGARDING PEPSICO IS ***NOT RES JUDICATA*** AS TO FBT.

In her opposition, the Pennsylvania Insurance Commissioner goes to considerable lengths to assert that FBT did not contest the plan, *which is true.* The crux of the opposition brief is that FBT (which was not a party to the Pennsylvania proceedings during the years 1986 through 1992) is bound by that decision. This is actually a backward application of the doctrine of *res judicata.* Beacuse FBT did not submit to the jurisdiction of the Pennsylvania Courts during the formulation of the plan, *res judicata* does not apply.

Moreover, as we have set forth in our original brief, ***FBT is no Pepsico.*** The equities which (theoretically) may have been weighed in the Pepsico instance are not the same equities applicable to FBT, which waited for a decade before it received ***one red penny!!!***

The rehabilitator's effort to bind FBT to a totally foreign proceeding twists the doctrine of *res judicata* beyond recognition. The only judgment which is *res judicata* is the Louisiana judgment.

(4) IT WAS MUTUAL WHICH WAIVED THE PLAN BY *NEVER INCLUDING FBT* IN THE PLAN; MOREOVER, MUTUAL IS ESTOPPED FROM INVOKING A PLAN WHICH IT *NEVER PLEADED AS A DEFENSE IN THE LOUISIANA LITIGATION.*

In her opposition, the Pennsylvania Insurance Commissioner casts stones from a glass house. It was Mutual which waived the plan. It was Mutual which **NEVER** raised the plan in the Louisiana Courts. It was Mutual which **NEVER** included FBT as a recipient of the proportional payments made to all Class 4 Claimants. Because of its conduct, Mutual is estopped from looking to the plan in order to override FBT's constitutional rights.

When Mutual answered FBT's petitions in the Louisiana courts on June 20, 1988, it did not invoke the plan. (A-25, note 4). When FBT filed a motion for summary judgment, seeking policy limits ***and*** judicial interest, Mutual did not invoke the plan. (A-25, note 5). After judgment was rendered, Mutual did not object to the award of judicial interest. (A-25, note 6). While the appeals were pending, Mutual urged FBT to "...proceed within the Louisiana State Court System...", as opposed to the plan. (A-26, note 7). On two occasions, adjusters for Mutual and the rehabilitator wrote to FBT, suggesting that FBT's hardship application would be considered only after "...the underlying litigation has been resolved..." (A-26, note 9).

It was Mutual that waived the plan, as it had the right to do under Pennsylvania law. Mutual elected remedies. FBT was never a participant in the plan and never received any benefits from the plan.

(5) THE OPPOSITION DOES NOT CONTEST THE ANNOUNCEMENT THAT MUTUAL WILL SOON "...*EMERGE AS A FUNCTIONING INSURANCE COMPANY...*" AND THE SOLVENCY EXCEPTION APPLIES.

Mark our words: ***Mutual will soon reach solvency.*** These were also the words of Alexander Bratic, who so announced to all the world in January of 1995. (A-66 to A-68) At page 19 of her opposition, the rehabilitator recognizes the "solvency exception" and concedes that interest is payable if enough funds are generated to pay all claims of equal dignity.

Mutual does not retract Mr. Bratic's words and does not contest what he said. This is because Mr. Bratic spoke truthfully. This has been a successful rehabilitation and FBT is intitled to avail itself of the "solvency exception".

The suggestion that Mutual is still insolvent is deceptive and inconsistent with public announcements presently being made. Despite nine years of inactivity, Mutual continues to carry excessive reserves for losses, excessive reserves for IBNR[1], and unrealistic reserves for unauthorized reinsurance.

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[1] IBNR stands for "Incurred But Not Reported" claims. After almost 10 years of inactivity and protection, this number should be zero.

CONCLUSION

The law of this Court should be applied, and FBT's constitutional rights should be enforced. This is, first and foremost, a Full Faith and Credit case. Substantial other Constitutional issues have been raised throughout this litigation and support the granting of Certiorari.

Respectfully submitted:

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STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, personally came and appeared:

HENRY L. KLEIN

who after first being duly sworn, did depose and say that he has served upon the following parties, copies of this reply to the opposition filed by Mutual in connection with our application for writs to the United States Supreme Court, by placing same in the United States Mail, postage prepaid, on this 4th day of May, 1995:

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_____
HENRY L. KLEIN

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY, ON THE
_____ DAY OF _____, 1995.

_____
NOTARY PUBLIC